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No. 82-235

In the Supreme Court of the United States

OCTOBER TERM, 1982

G. PATRICK MORRIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals' prior decision in this case is the law of the case and decided most of the questions raised by petitioners.

2. Whether the district court properly refused to permit petitioners to amend their complaint following the denial of certiorari in the earlier appeal.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. C-1 to C-3) is reported at 676 F. 2d 711. The district court's memorandum and order of dismissal (Pet. App. G-1 to G-7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1982, and a petition for rehearing was denied on April 16, 1982 (Pet. App. L-1). On July 7, 1982, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including August 16, 1982. The petition was filed on August 10, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In early 1963, petitioner G. Patrick Morris and 11 friends and relatives ("the entrymen") set out to develop 3,789.62 acres of desert land owned by the United States and located along the Snake River in Idaho. The entrymen obtained water permits from the State of Idaho and filed declarations with the Department of the Interior, pursuant to the Desert Land Act, 43 U.S.C. 321 *et seq.*, covering 12 adjacent 320-acre parcels of previously undeveloped public land. The entrymen then assigned the water permits to the Sailor Creek Water Company and entered into a series of lease, contract, and mortgage agreements with Sailor Creek. Under those agreements, Sailor Creek promised to construct an irrigation system for the 12 parcels, and the entrymen agreed to pay for the irrigation project, with payment to be secured solely by nonrecourse mortgages on each of the parcels. In addition, the other 11 entrymen leased their land to petitioner Morris who, in turn, arranged for Sailor Creek to lease all 12 entries for a total of 11 years. The rental was calculated to cover the entrymen's taxes and the payments for the irrigation system. The lease also provided that Sailor Creek was to exercise total control of the farming operations and to retain all revenue from those operations. Thus, Sailor Creek became both the mortgagee and lessee of more than 3,700 acres of public land (Pet. App. A-2, D-2 to D-15, D-30, E-5 to E-10).[1]

In 1966, after becoming aware of the arrangement between the entrymen and Sailor Creek, the Bureau of Land Management ("BLM") filed contests against the entries, alleging that the entrymen had unlawfully assigned

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[1]By 1965, Sailor Creek had completed the irrigation project and had installed farm equipment. Both the project and the equipment were primarily designed for farming the entire 12 parcels as one farm (Pet. App. D-11, F-3).

their interests to a corporation, in violation of 43 U.S.C. 324, and that the Sailor Creek project, which involved more than 3,700 acres, exceeded the 320-acre limitation contained in 43 U.S.C. 329. BLM accordingly sought cancellation and forfeiture of the entries (Pet. App. D-26, E-26).

Following an evidentiary hearing, the administrative law judge dismissed the complaints (Pet. App. D-21 to D-48). With regard to BLM's claim that the entrymen had unlawfully assigned their parcels to a corporation, the ALJ concluded that the lease-mortgage arrangements did not constitute assignments within the meaning of 43 U.S.C. 324. The ALJ further found that petitioners had not exceeded the 320-acre limit because Sailor Creek did not possess all of the rights of the entrymen.

The BLM appealed, and the Interior Board of Land Appeals ("IBLA") reversed. The IBLA found (Pet. App. E-10 to E-23) that Sailor Creek's possessory and legal interests under the lease-mortgage agreements constituted a "hold[ing] [of desert land] by assignment or otherwise" proscribed by 43 U.S.C. 329.[2] In addition, the IBLA held that the government was not estopped from seeking forfeiture of the entries, because petitioners had not relied upon any official action. The IBLA therefore ordered the entries cancelled (Pet. App. E-23 to E-27).

The entrymen then filed suit in the United States District Court for the District of Idaho seeking review of the IBLA decision. On cross-motions for summary judgment, the district court held that the arrangements between the entrymen and Sailor Creek were "holdings" prohibited by 43 U.S.C. 329 and that the lease-mortgage transactions

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[2]The IBLA strongly suggested (Pet. App. E-21) that the arrangements also constituted unlawful assignments in violation of Section 324.

constitued unlawful assignments within the meaning of 43 U.S.C. 324 (Pet. App. F-4 to F-6, F-15). However, the court reversed the portion of the IBLA decision requiring cancellation of the entries, terming that remedy "egregiously harsh under the circumstances of this case" (Pet. App. F-10). The court noted expenditures for improvement of the entries, as well as what it viewed as a change in the administrative interpretation of the relevant statutes and delay in the initiation of the contests (Pet. App. F-10 to F-12). The court therefore ordered the Secretary to issue the contested patents upon proof that Sailor Creek had divested itself of all impermissible interests in the entries (Pet. App. F-13, F-16).

Both sides appealed. Pet. App. A-1 to A-9; 593 F. 2d 851. Rejecting the entrymen's appeal, the court of appeals held that "the Sailor Creek scheme constituted an assignment within the meaning of § 324" and that "the consolidated interests amassed under the contracts and leases constituted a 'holding' in excess of 320 acres, in violation of § 329" (Pet. App. A-4). On the remedy issue, the court held that the Department of the Interior was not estopped from enforcing the provisions of the Desert Land Act even though it had not challenged the entries until the development work was complete. The court concluded that there was no basis for estoppel because the government had no knowledge of the terms of the contracts between the entrymen and Sailor Creek until after petitioners had completed their development scheme (Pet. App. A-4 to A-9).

The court subsequently denied a petition for rehearing (Pet. App. B-1 to B-2) and this Court denied a petition for a writ of certiorari. 444 U.S. 863 (1979).

Petitioners then moved the district court to consider certain issues allegedly not adjudicated on appeal or, in the alternative, to find that the court of appeals lacked jurisdiction to entertain the appeal and that its decision was

therefore void (Pet. App. G-1). In addition, petitioners sought leave to amend their complaint by adding 11 new counts.[3]

The district court denied petitioners' motion to amend, affirmed the IBLA's decision, and dismissed the entrymen's action (Pet. App. H-1). The court held that its previous decision was a final order appealable under 28 U.S.C. 1291 (Pet. App. G-4 to G-7). Rejecting the argument that the order had failed to dispose of all of petitioners' claims, the court observed (*id.* at G-4):

> This was not truly a case of multiple claims requiring certification under [Fed. R. Civ. P.] 54(b). This was, rather, a case of a single claim for relief based upon

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[3]Those counts alleged (80-3506 Excerpts of Record 59-65 ("R.")), among other things, that the cancellation of the desert land entries violated their right to equal protection and due process of law (ninth count) (R. 59); that the administrative complaints and notice of hearing were insufficient (tenth count) (R. 60); that the IBLA failed to consider and rule upon certain issues raised in the administrative proceedings (eleventh count) (R. 60); that IBLA's failure to consider and rule upon every issue violated due process (twelfth count) (R. 61); that if the transaction between the entrymen and Sailor Creek constituted excess holdings under 43 U.S.C. 329, the proper remedy was an injunction and/or damages and that the IBLA lacked jurisdiction to cancel the entries (thirteenth count) (R. 61); that the administrative proceedings violated the Administrative Procedure Act and departmental regulations and that IBLA's decision was void for lack of jurisdiction (fourteenth count) (R. 61-62); that the provisions of 43 U.S.C. 329 "as interpreted by the IBLA and as applied to the facts of this case, are unconstitutionally vague" (fifteenth count) (R. 62); that respondents were "impermissibly prejudiced" against the entrymen and thus denied them due process (sixteenth count) (R. 62-63); that the Department of the Interior's combination of policymaking, prosecutorial, and administrative functions violated due process (seventeenth count) (R. 63); that the Department of the Interior was barred by laches from prosecuting the administrative proceedings and cancelling the entries (eighteenth count) (R. 63-64); and that by accepting the purchase price for each entry the United States had waived the right to cancel any of the entries for violation of the Desert Land Act (nineteenth count) (R. 64).

> alternative legal theories, and, as such, was not ripe for 54(b) treatment.

The court also rejected petitioners' contention that the order was not final due to the provision allowing them several months to divest themselves of the illegal assignments (Pet. App. G-4 to G-6).

The court denied petitioners' subsequent motions to vacate its order of June 23, 1980 (Pet. App. H-1), and petitioners appealed. The court of appeals affirmed (Pet. App. C-1 to C-3), holding that its previous decision was the law of the case. The court stated (Pet. App. C-3):

> Appellants' briefs in the instant appeal and their motion to amend their complaint after the remand do not appear to state any issues substantially different from those raised in appellants' briefs and petition for rehearing in the previous appeal, and they certainly fail to allege any issues not decided by necessary implication in our prior judgment.

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioners seek review of numerous questions that were decided in their earlier appeal. As the court of appeals correctly held (Pet. App. C-2), however, "[i]ssues decided on appeal, either expressly or by necessary implication, are generally binding on remand and on a subsequent appeal." See, *e.g.*, *Conway* v. *Chemical Leaman Tank Lines, Inc.*, 644 F. 2d 1059, 1061-1062 (5th Cir. 1981); *Todd & Co.* v. *SEC*, 637 F. 2d 154, 157 (3d Cir. 1980); 1B J. Moore & T. Currier, *Moore's Federal Practice* para. 0.404[10], at 573 (2d ed. 1982).

As previously noted, the earlier appeal in this case arose when both sides challenged a district court decision holding, first, that Sailor Creek held more than 320 acres of desert entry land, in violation of 43 U.S.C. 329; second, that petitioners had assigned their entries, in violation of 43 U.S.C. 324; and third, that the entries should be cancelled only if petitioners did not divest themselves of the disqualifying assignments within a period specified by the court (see Pet. App. F-14 to F-18).

The court of appeals agreed with the district court that Sailor Creek's holding violated 43 U.S.C. 329 and that the entrymen had assigned their entries, in contravention of 43 U.S.C. 324 (Pet. App. A-4). However, the court of appeals held that the portion of the IBLA decision ordering outright cancellation of the entries should have been sustained (Pet. App. A-5 to A-9).

At least six of the ten questions now raised by petitioners were decided either expressly or by implication in the earlier appeal, and petitioners raised those same questions or nearly identical ones in their earlier, unsuccessful petition for a writ of certiorari.

In the first appeal, the court of appeals expressly decided petitioners' present question four, *i.e.*, "[w]hether the leases and mortgages violated the holding limitation of 43 U.S.C. § 329" (Pet. i). In their previous petition, petitioners raised a virtually identical question (79-7 Pet. 2): "Do a mortgage and a sublease (or a lease) constitute the holding of the lands in a desert land entry within the meaning of 43 U.S.C. § 329?" In the first appeal the court of appeals decided these questions when it stated that "the consolidated interests amassed under the contracts and leases constituted a 'holding' in excess of 320 acres, in violation of § 329" (Pet. App. A-4).

The court of appeals' first opinion decided petitioners' present question five in equally plain language. Petitioners state that question as follows (Pet. i): "Whether violation of the holding limitation of § 329 is ground for cancellation of the entries." Several questions presented in petitioners' earlier petition also challenged the government's right to cancel the entries based upon 43 U.S.C. 329.[4] The court of appeals decided this issue in the first appeal, stating (Pet. App. A-4):

> The statute states that "no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than" 320 acres of land, and provides for contesting and cancellation. 43 U.S.C. § 329.

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[4]The questions stated (79-7 Pet. 2, 4):

> 3. Does the holding by a single entity, by assignment or otherwise, of more than 320 acres of desert entry land, warrant or require forfeiture of all land thus held, and all moneys paid for that land, where the transactions were voluntarily submitted to the Bureau of Land Management nearly 22 months before the entries were challenged?
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> • • • • •
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> 5. Did the Interior Board of Land Appeals abuse its discretion or exceed its powers and authority by cancelling the desert land entries on the basis of a new and different interpretation of 43 U.S.C. § 329 adopted by the Secretary of the Interior 22 months or more after the entrymen made final proof and final payment for the land?
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> • • • • •
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> 11. Did the right to patent vest in the entrymen upon making final proof and final payment under 43 U.S.C. § 329, so as to preclude the Department of the Interior from thereafter cancelling the entries on the basis of limitations, requirements or procedures not stated in regulations or decisions which were in effect when final proof and final payment were made?

The court of appeals' first decision necessarily decided petitioners' present question six, *i.e.*, "[w]hether the IBLA's interpretation of 43 U.S.C. § 329 can be applied to these entries" (Pet. i). The court agreed with that interpretation, and held that the IBLA had not erred in applying it in this case (see Pet. App. A-7 to A-9). Again, essentially the same question was raised in the earlier petition.[5]

The court of appeals also implicitly decided petitioners' question seven, *i.e.*, "[w]hether the IBLA's decision [was] supported by substantial evidence" (Pet. i). The court approved the trial court's parallel findings that petitioners had "assigned" their entries and that Sailor Creek held more than 320 acres of desert land (*id.* at A-4). The court also approved the IBLA's finding that " '[t]he Government was not informed of the terms of the lease agreement until after it made a specific request for the information' " (Pet. App. A-6; see also Pet. App. A-7 to A-8). Thus, the court of appeals clearly sustained all the findings upon which the IBLA's decision rested.[6] The earlier petition in this case raised a virtually identical question.[7]

Petitioners raise the question "[w]hether the courts below had jurisdiction to decide the assignment issue" (Pet. i, question two). The same question was raised in the earlier

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[5]Question five in the earlier petition is quoted in note 4, *supra*.

[6]Moreover, the court of appeals agreed with the district court except with respect to the issue of remedy, and the district court had held (Pet. App. F-5) that except with regard to that question "[t]he interpretation and analysis undertaken by the IBLA is supported by substantial evidence."

[7]The prior petition raised the question (79-7 Pet. 3):

> 7. Is the Interior Board of Land Appeals' finding that the Bureau of Land Management was not aware that the entrymen intended to lease their entries to a single farming entity supported by substantial evidence?

petition,[8] and it is clear that the court of appeals decided it in the first appeal. Since that court decided the assignment issue (Pet. App. A-4), it necessarily held that the issue was properly before it.

Finally, the court of appeals implicitly rejected respondents' argument that "[t]he administrative charges failed to provide adequate notice of the matters of fact and law asserted, and were [therefore] insufficient to confer jurisdiction of the administrative proceedings" (Pet. 12; see Pet. i, question one). This same contention was advanced in the previous petition, where petitioners raised the question (79-7 Pet. 5, question fifteen): "Should the administrative contests have been dismissed because of the BLM's failure to state in the administrative complaints the matters of fact and law asserted?"[9] Even if the administrative charges had been defective (and they plainly were not),[10] petitioners had

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[8]In any event, petitioners' claim (Pet. 14) that the district court lacked "jurisdiction" to interpret or apply 43 U.S.C. 324 is absurd. Petitioners' own complaint alleged (count 1, para. VI): "The Decision of the [IBLA] is based on an erroneous interpretation of the Desert Land Act, and particularly 43 U.S.C. * * * 324" (R. 6).

[9]The earlier petition raised the question (79-7 Pet. 2):

> 4. Can the administrative decision cancelling the desert land entries be upheld, on judicial review, on a finding by the District Court and by the Court of Appeals that the entries had been assigned, where the Interior Board of Land Appeals made no such finding and did not reverse the Administrative Law Judge's finding that the entries had not been assigned?

[10]Petitioners assert (Pet. 15) that the administrative complaints were defective because they "did not state that the mortgages and leases, in combination, constituted a holding under 43 U.S.C. § 329, or that the activities of Sailor Creek constituted such possession and control and the receipt of such benefits as to constitute a holding under § 329." However, the complaints unambiguously alleged (Pet. App. E-4):

> The contestee entered into arrangements whereby others held his entry, together with other desert entry land, in an aggregate of more than 320 acres in violation of * * * 43 U.S.C. sec. 329.

full notice of the nature of the charges when the case was before the IBLA, and as the court of appeals noted, "the IBLA has all the powers on appeal of the initial decision which it would have had in making the initial decision itself" (Pet. App. A-8).

2. Petitioners contend (Pet. 12-13) that the court of appeals' earlier decision is not the law of the case because the district court order from which the appeal was taken was not "final" within the meaning of 28 U.S.C. 1291. Petitioners themselves appealed the same order under 28 U.S.C. 1291 and did not raise the issue of appellate jurisdiction either in the court of appeals or in their petition for a writ of certiorari. In any event, petitioners' jurisdictional arguments clearly lack merit.

Noting that the district court order provided for cancellation of the entries only if petitioners did not divest themselves of the disqualifying assignments (Pet. App. F-18), petitioners first claim (Pet. 12) that the order was not final because it "reserved jurisdiction to rule on the adequacy of the divestiture documents." However, it has long been settled that an order is final for purposes of appeal where it directs the immediate delivery of physical property but leaves certain ministerial tasks, such as an accounting, undone and where immediate execution of the order threatens hardship to the party required to relinquish the property. See, *e.g.*, *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 67-72 (1948); *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 125-126 (1945); *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201 (1848); *Sekaquaptewa* v. *MacDonald*, 575 F. 2d 239, 243 (9th Cir. 1978). The district court order here fell within that category. If petitioners had been required to complete divestiture before an appeal could be taken, they could not have easily regained their entries had they prevailed on appeal.

Petitioners also claim (Pet. 12) that the district court order was not final because it did not dispose of their claim for damages. But since the district court ruled against petitioners on the issue of liability (by holding that 43 U.S.C. 324 and 329 had been violated and that divestiture of the assignments was required), the court obviously did not have to address the question whether damages should be awarded in petitioners' favor.

Furthermore, even if the district court's order was not final, it was nevertheless an order "granting" and "refusing" an injunction and was accordingly appealable under 28 U.S.C. 1292(a)(1). Petitioners' complaint sought an injunction unconditionally "[r]equiring the Secretary of the Interior to issue and deliver to the individual [petitioners] patents for the conveyance of title to the lands in their respective entries". The district court ordered issuance of the patents on the condition that petitioners effectively divest themselves of the unlawful assignments (Pet. App. F-16). Thus, both sides could appeal that order under 28 U.S.C. 1292(a)(1).[11]

3. Petitioners assert (see Pet. i, question eight) that the district court erred by denying them leave to amend their complaint after summary judgment on their original claims had been granted in favor of the government and affirmed on appeal. Petitioners also seek review of several of the questions raised in their proposed amended complaint (see Pet. i, questions nine and ten).

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[11]Moreover, even if the court of appeals lacked jurisdiction to entertain the first appeal, there is no reason to believe that the court would have decided any issue differently if it had been required to consider the issues afresh in the second appeal. On both occasions, petitioners' suggestion for rehearing en banc was denied without a single judge requesting a vote on the suggestion. Similarly, this Court previously denied review of the six issues discussed above, and those issues do not merit further review now any more than they did then.

"Where, although given an opportunity to amend, the pleader has stood upon his pleading and appealed from a judgment of dismissal, he will not ordinarily be able to amend either in the appellate court, or in the trial court if the order of dismissal is affirmed, unless the mandate of the appellate court expressly permits such amendment." 3 J. Moore, *Moore's Federal Practice* para. 15.11, at 15-147 (2d ed. 1982). See also *Prescription Plan Service Corp.* v. *Franco*, 552 F. 2d 493 (2d Cir. 1977); *United States Fidelity & Guaranty Co.* v. *Perkins*, 388 F. 2d 771 (10th Cir. 1968). Here, permitting the requested amendments would have been inconsistent with the court of appeals' mandate. As the court stated (Pet. App. C-3): "There being no ambiguity or flexibility in the decision of this court in the prior appeal, * * * the district court properly interpreted that opinion as requiring entry of judgment for the United States."

Moreover, even if the court of appeals' mandate did not preclude the proposed amendments, the district court did not err in refusing to permit them. Where, as here, a responsive pleading is served before the motion to amend is filed, the question whether to permit amendment of a complaint without the other party's consent is committed to the sound discretion of the trial judge. Fed. R. Civ. P. 15(a); *Daly* v. *Sprague*, 675 F. 2d 716, 723 (5th Cir. 1982); *Neighborhood Development Corp.* v. *Advisory Council on Historic Preservation*, 632 F. 2d 21, 25 (6th Cir. 1980). In this case, the trial judge plainly did not abuse his discretion, since respondents merely sought to relitigate issues that were not "substantially different from those raised in appellants' briefs and petition for rehearing in the previous appeal" (Pet. App. C-3). Petitioners' "undue delay, bad faith [and] dilatory motive," and the "futility of amendment[s]" (*Foman* v. *Davis*, 371 U.S. 178, 182 (1962)) fully justified the court's ruling.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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